

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**Case No. 04-20006-01-JWL**

**ALVAREZ McCULLOUGH,**

**Defendant.**

**MEMORANDUM AND ORDER**

Defendant Alvarez McCullough filed a motion to suppress (Doc. 11) wherein he alleges that law enforcement officials violated his rights under the Fourth Amendment by entering his place of residence without a warrant. For the reasons set forth below, however, the court concludes that the challenged search and seizure was constitutional. In particular, the court finds that exigent circumstances justified law enforcement's warrantless entry into the residence located at 3244 Cleveland Avenue in Kansas City, Kansas on the date in question. As such, the physical evidence flowing from this warrantless entry is not subject to suppression under the exclusionary rule.<sup>1</sup>

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<sup>1</sup> At the suppression hearing, Jami Maieka Mosley, the homeowner, testified in support of the defendant. On cross-examination, Ms. Mosley invoked her Fifth Amendment privileges and refused to answer the government's additional questions. The government moved to strike her testimony and filed a memorandum in support of that request. (Doc. 20). The court denies the government's motion as moot, given that it finds no constitutional violation even when considering the testimony of Ms. Mosley.

## **BACKGROUND**

On June 9, 2003, the residence located at 3244 Cleveland Avenue in Kansas City, Kansas was equipped with a residential security system monitored by ADT Security Services, Inc. ("ADT"). At approximately 8:18 p.m. that evening, the security system sent an alarm signal to ADT's monitoring center. An ADT associate placed a telephone call to the residence and an individual identifying herself as Heather Gordon answered the telephone. After Ms. Gordon was unable to provide the homeowner's personal identification code, the ADT associate called the Kansas City, Kansas Police Department at approximately 8:21 p.m. The 911 operator answered the call and relayed the pertinent information to the police dispatcher, who, in turn, dispatched Officer Sandra Carrera and Officer George Simms to the scene.

At approximately 8:23 p.m., after police were dispatched to the residence, the alarm was restored and automatically reset. In response, an ADT representative called the 911 operator to cancel the alarm at 3244 Cleveland Avenue at approximately 8:26 p.m. The department's policy, however, does not permit a 911 operator to cancel an alarm call once officers have been dispatched to the scene. The 911 operator neither informed the police dispatcher nor the responding police officers that the alarm company had cancelled the call.

Officer Carrera was first to arrive on the scene at approximately 8:31 p.m. Officer Simms arrived shortly thereafter. Upon arrival, Officer Carrera observed a white male (later identified as Richard Cook) walking out of the basement's sliding glass door and a white female (later identified as Heather Gordon) standing next to him. Officer Carrera described their appearance as "dirty," meaning that they were wearing clothing that was worn and stained with dirt. Mr. Cook

appeared to be disoriented and could not communicate verbally, and Ms. Gordon appeared nervous and “fidgety.” Officer Carrera asked the two individuals if they were the homeowners. Ms. Gordon said that they were not the homeowners, but were there building a privacy fence for the owner. She explained that the homeowner had given them permission to use the restroom facilities located in the basement. While Ms. Gordon could not identify the homeowner by name, she explained to Officer Carrera that there was a false alarm, that she had contacted the homeowner to obtain the alarm code, and that she had successfully reset the security system. To verify this information, Officer Carrera entered the residence to check the alarm panel. Once inside, she observed that the red light (instead of the green light) was on and the display monitor was flashing 01/04, which indicated to Officer Carrera that there was still an active alarm covering the front door and motion detectors. Officer Carrera then exited the residence with heightened suspicion.

Ms. Gordon then informed Officer Carrera that she knew how to contact the homeowner. Ms. Gordon, using her cellular telephone, dialed a number and handed the telephone to Officer Carrera. An unidentified man answered, and Officer Carrera asked him if he was the homeowner, to which he responded in the negative. Ms. Gordon dialed another number and once again advised Officer Carrera that she had the homeowner on the telephone. Officer Carrera took the telephone and spoke with a female who identified herself as Jami Mosley, the homeowner. The woman purporting to be Ms. Mosley stated that the two individuals at her residence were there to build a privacy fence, although she did not know or could not recall their names. When Officer Carrera

asked whether anyone should be inside her residence, the woman refused to answer the question and asked to speak with Ms. Gordon.

Concerned that she had interrupted a burglary in progress, Officer Carrera decided to enter the basement through the sliding glass door (the same door she observed Mr. Cook exiting upon her arrival) to verify whether or not there was a bathroom in the basement and to see if there was evidence of a break in. Upon entering the basement area and making a left turn, Officer Carrera immediately observed a cellophane bag containing what she believed to be marijuana located on top of a counter in plain view. As Officer Carrera turned around to exit the residence, she observed an open trash bag that contained a larger quantity of what she believed to be marijuana. Officer Carrera exited the residence and informed Officer Simms of her discovery. The officers detained Ms. Gordon and Mr. Cook, contacted a supervising officer, and secured the residence. Law enforcement officials obtained a warrant to search the residence and seized several guns, crack cocaine, powder cocaine, and marijuana therein.

## **ANALYSIS**

Mr. McCullough argues that Officer Carrera violated his Fourth Amendment right to be free from unreasonable searches and seizures by twice entering the residence located at 3244 Cleveland Avenue without a search warrant. The government, however, contends that exigent circumstances justified the warrantless entries. The court believes that the active burglar alarm, combined with other evidence at the scene, created an exigency that justified Officer Carrera's warrantless entries into the home.

### **I. Legal Framework**

“It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.” *Payton v. New York*, 445 U.S. 573, 586 (1980). “In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.” *Id.* at 590. Even so, “[p]robable cause accompanied by exigent circumstances will excuse the absence of a warrant.” *United States v. Davis*, 290 F.3d 1239, 1242 (10th Cir. 2002).

“The basic aspects of the ‘exigent circumstances’ exception are that (1) the law enforcement officers must have reasonable grounds to believe that there is immediate need to protect their lives or others or their property or that of others, (2) the search must not be motivated by an intent to arrest and seize evidence, and (3) there must be some reasonable basis, approaching probable cause, to associate an emergency with the area or place to be searched.” *Id.* The government bears the burden of establishing exigency. *United States v. Rhiger*, 315 F.3d 1283, 1288 (10th Cir. 2003). In deciding whether the government has satisfied this burden, the court “evaluate[s] the circumstances as they would have appeared to prudent, cautious and trained officers.” *Id.* (citations and quotations omitted). Nevertheless, “there is no absolute test for the presence of exigent circumstances, because such a determination ultimately depends upon the unique facts of each controversy.” *Id.*

## **II. Application of the Legal Framework**

The question presented in this case is whether the law enforcement officers’ response to the burglar alarm, combined with their observations at the scene, created an exigency that justified

a warrantless entry into the residence located at 3244 Cleveland Avenue. In some situations, a law enforcement officer's response to an activated security alarm can present him or her with exigent circumstances that justify a warrantless entry into the home. For example, in *United States v. Tibolt*, 72 F.3d 965 (1st Cir. 1995), a security alarm was set off at a residence located in Gloucester, Massachusetts. *Id.* at 967. After the security company was unable to make telephone contact with the owners of the residence, it notified the Gloucester Police Department of the alarm. *Id.* Upon reaching what they believed to be the resident's home, police officers checked the exterior for signs of an attempted break in, or burglary in progress. *Id.* One officer found an unlocked door on the rear deck. *Id.* He opened the door and called inside to alert the occupant, but received no answer. *Id.* "Given that the police had been requested to investigate the alarm, that a door was unlocked, and that [the officer] had been unable to make contact with anyone inside the house, he reasoned that the alarm might not have been activated accidentally." *Id.* As such, he entered the residence and conducted a sweep of the interior. During the course of this protective sweep, he discovered a marijuana growing facility in the basement. In affirming the district court's denial of defendant's motion to suppress, the First Circuit concluded that these facts presented officers with exigent circumstances permitting an immediate warrantless entry into the residence. *Id.* at 970. The court explained that "[w]ithout entering, he could not know but what an intruder had managed to get into the residence, and even injured or captured a resident, then fled; or had been caught off guard by the police and remained in the residence with a forcibly detained resident." *Id.*

In *United States v. Dighera*, 2 F. Supp. 2d 1377 (D. Kan. 1998), Judge Crow found exigent circumstances existed in a situation nearly identical to that presented in *Tibolt*. In *Dighera*, the defendant's residential security alarm activated and the alarm company reported it to the police department. *Id.* at 1377. Upon arriving at the scene, officers found the front door open. *Id.* When nobody responded to their calls, officers entered the residence through the open door and found drug paraphernalia in plain view. *Id.* Relying on *Tibolt*, Judge Crow concluded that the officers' warrantless entry into the residence was justified based upon exigent circumstances. *Id.* at 1380.

The Tenth Circuit has not squarely addressed this issue. In *Walker v. Disner*, 50 Fed. Appx. 908, 2002 WL 31420772, No. 02-1020 (10th Cir. Oct. 29, 2002), however, the court suggested that a burglary call could constitute an exigency justifying a warrantless entry into the residence. In *Walker*, the plaintiff sought relief under 42 U.S.C. § 1983 based on law enforcement's alleged violation of his rights under the Fourth Amendment. *Id.* at 909. On the evening of September 27, 1999, the plaintiff had an argument with his wife and left their apartment. *Id.* He returned the following morning to find that he could not unlock the door. *Id.* The apartment maintenance manager informed him that his wife had changed the locks and requested that he not be allowed inside the apartment. *Id.* Nevertheless, Mr. Walker forced his way into the apartment, and the maintenance manager called the police. Upon arriving at the scene, officers knocked on the door, but Mr. Walker did not answer. Officers forced entry into the apartment and arrested Mr. Walker. Relying on *Tibolt*, the Tenth Circuit noted that the search was authorized under the emergency

exception to the warrant requirement because the officers had received a burglary call, and upon arriving at the apartment, observed signs of a burglary. *Id.*

This authority suggests that the reported alarm justified the warrantless entries into the home located at 3244 Cleveland Avenue. Mr. McCullough, however, argues that unlike the situation presented in *Tibolt* and *Dighera*, here Officer Carrera received a logical explanation for why the security system had been activated. According to Mr. McCullough, this should have quelled the concerns of law enforcement. While Ms. Gordon did provide Officer Carrera with a rational explanation for the alarm, defendant's argument fails to account for the totality of the circumstances.

When Officer Carrera arrived on the scene, she observed an unknown man exiting the basement door and an unknown female standing next to him. Both individuals were dressed in worn and dirty attire. The man appeared to be disoriented and could not communicate verbally, and the woman appeared nervous and "fidgety." Admittedly, the woman, Ms. Gordon, stated that there had been a false alarm. At that time, however, Officer Carrera had no way of knowing whether or not Ms. Gordon was telling the truth or attempting to disguise a burglary. Both officers testified that it would have violated department policy to have simply accepted Ms. Gordon's claims at face value. Thus, both exigent circumstances and sound police practice required Officer Carrera to investigate further. Officer Carrera entered the residence to verify whether or not the alarm had been reset, as Ms. Gordon had claimed, but discovered that the alarm was still active.<sup>2</sup>

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<sup>2</sup> While Mr. McCollough's evidence suggests that the alarm may have been reset and that Officer Carrera, herself, tripped the alarm when she entered the front door of the



When Officer Carrera exited the residence, Ms. Gordon said that she would contact the homeowner on her cellular telephone. Ms. Gordon dialed a number and handed the telephone to Officer Carrera, but the man who answered said that he was not the homeowner. Ms. Gordon placed a second call, and this time a female answered and indicated that she was the homeowner, Jami Mosley. The woman also explained that the two individuals were on her property to build a privacy fence. The female purporting to be Ms. Mosley, however, did not know or could not recall the names of the workers. Moreover, when Officer Carrera asked whether these individuals should be inside her residence, the woman refused to answer the question and asked to speak with Ms. Gordon. Rather than corroborating the existence of a false alarm, these events only increased Officer Carrera's suspicion and once again justified further investigation.<sup>3</sup>

The totality of these circumstances demonstrate that Officer Carrera was justified in entering the residence without a search warrant. Both Officer Carrera and Officer Simms had

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residence, there is no evidence that Officer Carrera was aware of this fact. Instead, the evidence presented at the suppression hearing indicates that Officer Carrera held the subjective belief that Ms. Gordon falsely claimed that the alarm had been reset. The court finds that Officer Carrera's subjective belief was objectively reasonable given the totality of the circumstances. *See Tibolt*, 72 F.3d at 971 (noting that even though hindsight disclosed that there was not a true threat to life or property, the exigent circumstances doctrine still applied because *at the time*, an officer confronted with similar circumstances reasonably could have concluded that there was such a risk).

<sup>3</sup> Jami Mosley, the homeowner, testified at the suppression hearing that she never informed Officer Carrera that she did not know the identity of the individuals working at her home. She further testified that she informed Officer Carrera that the workers were building a privacy fence and that they had permission to use the bathroom in the basement. The court, however, found Officer Carrera to be particularly credible and finds her testimony to be more believable. Even if the court were to accept Ms. Mosley's testimony over Officer Carrera's, it did not eliminate the exigency because Officer Carrera had no way of knowing whether the female on the other end of the line was, in fact, the homeowner.

reasonable grounds to believe there was an immediate need to protect the life or property of the homeowner based on the initial alarm call and the events that transpired at the scene. Both officers testified that they entered the residence to determine whether or not there was a robbery in progress, not to arrest and seize evidence. Finally, the initial alarm and the unusual events described above provided the officers with a reasonable basis, approaching probable cause, to associate an emergency with the residence located at 3244 Cleveland Avenue.<sup>4</sup>

Judge Michael reached the same conclusion when faced with similar facts in *United States v. Porter*, 288 F. Supp. 2d 716 (W.D. Va. 2003). In *Porter*, the Winchester Police Department dispatcher transmitted a radio call notifying officers that a security alarm had been activated at 552 Allston Circle, the residence of the defendant. *Id.* at 718. Officer Brunson and Officer Christensen each individually responded, but Officer Brunson was first to arrive at the scene. *Id.* The residence located at 552 Allston Circle was an end-unit townhouse with one front door and one back door. *Id.* The police dispatcher had indicated that the alarm was activated at the back door of the residence. *Id.* When Officer Brunson arrived, there was no audible alarm sounding at the home. *Id.* As he approached the front door, a neighbor, Barry Sutton, emerged from the adjacent townhouse. *Id.* The neighbor explained that he had observed a young, female child from the neighborhood open the rear door of the residence. *Id.* The child's mother then pulled her away

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<sup>4</sup> The fact that ADT had notified the 911 operator that the alarm had been cancelled does not change this result because neither Officer Carrera nor Officer Simms were made aware of this fact. See *Doran v. Eckold*, 362 F.3d 1047, 1053 (8th Cir. 2004) (explaining that the courts judge the reasonableness of an alleged exigency based on the facts and circumstances known to the officers at the time of the search).

from the door, but the alarm subsequently activated. *Id.* After hearing the neighbor's account of the events, Officer Brunson surveyed the front door area of the defendant's townhouse and found no signs of a forced entry. *Id.* He knocked on the front door, but received no response. *Id.* He proceeded to the back door of the house with Officer Christensen, who had just arrived at the scene. *Id.* As the officers approached the back door, Brianna Nei, who owned the town house located at 544 Allston Circle, emerged from the back of Mr. Sutton's residence and informed the officers that her two-year-old-daughter had opened the back door of the residence located at 552 Allston Circle. *Id.* Nevertheless, the officers proceeded to enter defendant's residence through the back door and conducted a protective sweep of the area. *Id.* at 718-19. During the course of the sweep, officers found plastic bags containing a green plant substance resembling marijuana on the kitchen table and a substantial quantity of United States currency on a dresser located upstairs. *Id.* at 719.

In denying the defendant's motion to suppress, the district court found that exigent circumstances justified the warrantless entry and protective sweep. While recognizing that the officers had been given a rational explanation for the alarm, the court deferred to the law enforcement officers' determination that there might be reason to investigate further, given that they were required to make a complicated judgment in a very short period of time. *Id.* at 721. Moreover, the court found that the officers' conduct was exactly the type of police work the community would expect, and possibly even demand. *Id.* In the end, the court held that "the activation of an alarm in conjunction with additional information supporting the possibility of a

break-in is sufficient to support police officers' determination that an exigency exists." *Id.* In reaching this conclusion, the court explained:

The very purpose for a home security alarm is to signal that something may be amiss. In the face of an alarm, officers may reasonably conclude that a burglary may be in progress and may conclude, as here, that a neighbor's explanation to the contrary is not entirely credible. While this court by no means suggests that the police have license to enter a private residence every time an alarm is activated, they do have a duty to investigate, and, when the facts and circumstances suggest reasonable suspicion that an exigency exists, to enter the home. In the face of such circumstances, it would defy reason to suppose that law enforcement officers had to secure a warrant before investigating, leaving the putative burglars free to complete their crime unmolested.

*Id.* at 721-22 (internal citations and quotations omitted). The court finds Judge Michael's reasoning to be persuasive and his holding consistent with the Tenth Circuit's law discussing the general parameters of the exigent circumstances exception to the warrant requirement. Applied to the facts of this case, *Porter* demonstrates that the initial alarm triggered Officer Carrera's duty to investigate. When her investigation at the scene suggested that something was amiss, exigent circumstances justified her warrantless entries into the home.

### **CONCLUSION**

The court denies Mr. McCullough's motion in its entirety. In reaching this conclusion, the court finds that: (1) the law enforcement officers had reasonable grounds to believe that there was an immediate need to protect the homeowner's life or property, when they responded to the burglary alarm at 3244 Cleveland Avenue; (2) they were not motivated by an intent to arrest and seize evidence; and (3) they possessed a reasonable basis, approaching probable cause, to associate

an emergency with the residence. As such, exigent circumstances justified the warrantless entry that led to the discovery of contraband in plain view.

**IT IS THEREFORE ORDERED THAT** defendant's motion to suppress (Doc. 11) is denied.

**IT IS FURTHER ORDERED THAT** the government's motion to suppress the testimony of Ms. Mosley (Doc. 20) is denied as moot.

**IT IS SO ORDERED** this 14<sup>th</sup> day of May, 2004.

s/ John W. Lungstrum

John W. Lungstrum

United States District Judge